Supreme Court, U.S.
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No. 00-

IN THE
Supreme Court of the United States

JAMES IDA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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37pp

QUESTIONS PRESENTED

I.

Whether the participation of an unlicensed government attorney in a grand jury proceeding requires that the indictment is in violation of due process and equal protection?

II.

Whether the participation of an improper government attorney in a grand jury proceeding equates to a jurisdictional flaw requiring that the indictment be quashed?

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CITATIONS OF OPINIONS AND ORDERS

The United States Court of Appeals for the Second Circuit denied defendant's petition for rehearing with a suggestion for en banc review on November 11, 2000. The panel for the United States Court of Appeals for the Second Circuit entered its summary order in an unpublished opinion at *United States v. Ida*, # 00-1092 (2d Cir. Sept. 14, 2000). The panel opinion affirmed the District Court's finding from the United States District Court for the Southern District of New York, Lewis J. Kaplan, District Judge. That opinion is reported at *United States v. Ida*, Docket Number S1 96 Crim. 430.

STATEMENT OF JURISDICTION

The panel decision of the United States Court of Appeals for the Second Circuit was entered September 14, 2000. The petition for rehearing en banc was filed and denied. The en banc denial by the United States Court of Appeals for the Second Circuit was entered on November 11, 2000. This Court had jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V (1791)

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

> to the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property-without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV (1791) (in part)

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

STATEMENT OF THE CASE

James Ida was named in a 65 count indictment along with eighteen co-defendants on December 4, 1996, in the United States District Court for the Southern District of New York for violations of labor racketeering, extortion, bookmaking, conspiracy to murder, aiding and abetting in the interstate transportation of stolen property and a violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), Title 18, United States Code, Section 1962(d).

The trial commenced against Ida and two co-defendants on February 24, 1997, and ended on April 23, 1997.

The jury convicted Ida on Counts One, Two, Nine, Eleven, Eighteen, Twenty-One, Forty-Three, Forty-Five, Fifty-Eight and Fifty-Nine. The jury acquitted Ida on Count Ten.

On April 24, 1997, following the jury's verdict on guilt, the District Court held a jury trial on criminal forfeiture allegations against Ida. The same day, the jury returned a special verdict finding that various properties in which Ida had an interest were subject to forfeiture to fulfill the one million dollar verdict against him.[1]

On October 7, 1997, the Court sentenced Ida to a term of life imprisonment, five years supervised release, a mandatory $550 special assessment, and forfeiture of various property to fulfill the one million dollar verdict with the balance of the selling price in excess of the verdict to be returned to Ida.[2]

On April 30, 1999, the United States Court of Appeals for the Second Circuit upheld Ida's convictions, reversing the verdict on Racketeering Act 2(a) and Count Nine. *See United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 447 (1999).

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1. At the time Judge Kaplan instructed the jury, they were informed that the criminal forfeiture need only be decided by a mere preponderance of the evidence as opposed to beyond a reasonable doubt. Since then, this Court has ruled that every element of an offense that increases the maximum statutory punishment must be decided by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S.__ [67CrL483] (2000).

2. The government failed to return the balance of the selling price over one million dollars to Ida. It instead returned the funds to the individual who the government claimed was a "front" for Ida.

On October 15, 1999 Ida filed a pro se motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, alleging that he had discovered that Ms. Barbara Ward conducted the Grand Jury without being licensed to practice law in the State of New York, resulting in a violation of the rules of ethical conduct. On November 14, 1999, in connection with his motion for new trial, Ida filed a motion for discovery of the Grand Jury transcripts.

On December 14, 1999, the District Court issued its order denying Ida's motions. On December 17, 1999, the District Court construed Ida's traverse to the government's reply as being a reconsideration. The District Court maintained its original findings. Ida filed a timely notice of appeal on December 28, 1999.

The United States Court of Appeals for the Second Circuit affirmed the District Court's decision on September 14, 2000. Ida filed his petition for rehearing with a suggestion for en banc which was denied on November 11, 2000.

REASONS FOR GRANTING THE WRIT

I. MR. IDA WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WHEN AN IMPROPER GOVERNMENT ATTORNEY INVADED THE GRAND JURY PROCESS

Mr. Ida was denied his constitutional rights of due process and equal protection when an improper government attorney conducted the Grand Jury which returned the indictment against him.

A. The Due Process Clause of the Fifth and Fourteenth Amendments Protects All Individuals Accused of a Criminal Offense from Jurisdictional Flaws.

The notion that an indictment is a prerequisite to the issue of jurisdiction over all criminal cases in the federal courts is long established. *In Ex parte Bain*, 121 U.S. 1 (1887), this Court first stated that "an indictment found by a Grand Jury was indispensable to the power of the court to try the petitioner for the crimes with which he was charged." 112 U.S. at 12-13. For this reason, "[t]he Bain case . . . has never been disapproved . . ." *Stirone*, 361 U.S. at 218.

Consequently,

> [i]t has long been a settled rule of law in the United States Courts that the Declaration of Article 5 of the Amendment to the Constitution that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury is a jurisdictional claim that no court of the United States has authority to try a prisoner without indictment or presentation in such cases. United States v. Krepper, 159 F.2d 958, 970 (3d Cir. 1946) (quoting U.S. Const., Amend. V).

In the instant case, the Grand Jury investigating Ida was invaded by an improper government attorney who was without a New York law license and in violation of the ethical rules of conduct governing all attorneys who practice law in that state.

Ms. Barbara Ward was employed by the United States Attorneys office for the Southern District of New York using the title of an Assistant United States Attorney while being in direct violation of the laws of New York.

This Court established that the states have absolute authority over the issue of licensing of all attorneys who practice in its respective state. *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

The State of New York mandates that every attorney who practices law within its boundaries must pass the New York Bar and obtain a New York law license. Violations of the Judiciary Laws prescribed under § 478 and § 484 as well as the Constitutional Laws cited under § 702 and § 930 occurred when Ms. Ward appeared before the Grand Jury. In fact, Ms. Ward committed a crime pursuant to Judiciary Law § 485 for acting as an attorney without the benefit of a New York license.

This Court has embraced the fact that a proper membership in the state bar is a prerequisite to the right to appear before a federal court. *Selling v. Radford*, 243 U.S. 46, 50 S. Ct. 377, 378, 61 L. Ed. 585 (1917).

> The absence or loss of membership in a state bar absolutely destroys the condition of fair practice and professional character, without the possession of which there could be no possible right to continue to be a member of a federal bar. *In Re Martin*, 120 F.3d 256 (Fed. Cir. 1997).

The issue now facing this Court is whether an improper government attorney conducting a Grand Jury results in the

violation of an accused rights to due process and equal protection requiring a per se reversal or the showing of prejudice. In considering the facts, the analysis should weigh the following facts.

a) A prosecutor has more control over individuals' liberty and reputation than perhaps any other public official.

b) A prosecutor is a quasi judicial officer, whose duties include instructing a grand jury as to the law, deciding who and when to prosecute, deciding what plea should be tendered to the defendants, and many quasi judicial functions.

c) A fraud was committed on the court when Ms. Ward conducted the grand jury that returned the indictment against James Ida.

d) Criminal law does not only concern itself with the accuracy of the results, but also with the integrity of the process by which the person has been convicted. A conviction in which the integrity of the prosecutor is questionable should not stand.

e) Generally when something is the fruit of illegal governmental action it must be suppressed (*Wong Sun v. United* States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 441). A felony conviction obtained by an improper government attorney is the fruit of the illegal practice of law by that prosecutor.

f) Where a conviction is obtained by flagrant misconduct by a prosecutor or other law enforcement agent, the conviction must be vacated as violation of due process (*see People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.2d 714,

People v. Rao, 73 A.D.2d 88, 425 N.Y.S. 2d 122). In this case a flagrant fraud was committed on the court and the people of the Southern District of New York causing for a violation of the laws of New York State which governs all attorneys whether they practice in the private sector, for the state, or the justice department.

As the late Justice Brandeis stated in *Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944,

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law and the end justifies the means-to declare that the Government may commit crimes in order to secure a conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

B. The Trust and Confidence in the Criminal System Itself has been Eroded when a Law Breaker has been Permitted to Invade the Grand Jury Process.

The United States Court of Appeals for the Second Circuit has recognized the potential for manipulation of the federal Grand Jury process by government attorneys.

"The timing of an indictment's return lies substantially within the control of the prosecutor. Therefore, were we to construe the rule dependent upon indictment, a government attorney could manipulate the grand jury proceedings to avoid encumbrances." *United States v. Hammad*, 858 F.2d 834 at 839 (2d Cir. 1988).

The possibility for "manipulation" only becomes further exasperated when the government representative seleets to ignore the rules of ethical conduct and becomes a law breaker in the process.

> "The right of a citizen to an investigation by a grand jury pursuant to the law of the land *is invaded by the participation of an unauthorized person in such proceedings, be it great or small. It is not necessary that the participation should be corrupt, or unfair means were used.* ***If the person participating was unauthorized, it was unlawful.***" *United States v. Treadway*, 455 F.Supp. 959 (S.D.N.Y. 1978); *United States v. Echols*, 542 F.2d 948 (5th Cir.) *cert. denied*, 431 U.S. 904, 97 S.Ct. 1659, 52 L.Ed.2d 387 (1977).

The citizens have the right to expect a proper government attorney overseeing the initial phase of the due process system, the Grand Jury. Anything less would completely

errode the public's confidence and trust in the legal system itself. *See United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936).

The contamination of the Grand Jury by an improper government representative was the exact "extraordinary circumstance" required to fulfill the five prongs pursuant to Rule 33, as addressed by this Court in *United States v. Johnson*, 327 U.S. 106, 111-12 (1946). This finding has also been embraced recently in *Illinois v. Dunson*, No. 2-99-0893 (2000) (quoting *People v. Munson*, 319 Ill. 596 (1925).

The Seventh Circuit Court of Appeals has mandated that the fact that an attorney holds a law license in another state other than the state in which he or she practices, does not make them a proper representative in the state where he or she lacks licensure. *United States v. Meritt*, 528 F.2d 650 (1976).

It is a fundamental element of the Grand Jury process that the law refuses to permit anyone in its presence during the investigation who is not legally and properly before it.

Ms. Ward directed the Grand Jury investigating Ida while lacking the proper New York licensing. In fact, she was in violation of law. She could in no way be construed as a proper government representative. Her appearance contaminated the sanctity of the proceedings and took away the importance that all prosecutors maintain the appearance of propriety as well as the highest respect for the Rules of Ethical Conduct.

This Court should also consider that Ms. Ward appeared before the Grand Jury without the benefit of a judicial monitor to oversee her conduct. This fact distinguishes itself from the harmless error application in *United States v. Mechanik*, 475 U.S. 66 (1986). The bottom line is that if a government attorney is improper, the proceedings are tainted, causing for the trial court to lack jurisdiction over the prosecution.

II. THE TRIAL COURT LACKED JURISDICTION TO ALLOW THE TRIAL AGAINST JAMES IDA TO PROCEED WHERE IT WAS BASED UPON A TAINTED INDICTMENT RETURNED BY A GRAND JURY THAT WAS CONDUCTED BY AN IMPROPER GOVERNMENT REPRESENTATIVE

This Court has recognized that defects in the appointment of government attorneys can equate to jurisdictional flaws.

> **"Absent a proper representative"** of the government as a petitioner in this criminal prosecution, **jurisdiction is lacking** and the writ of cert., hereto granted, is now dismissed. *United States v. Providence Journal Company*, 485 U.S. 693 (1988).

Indeed, the Court dismissed the writ even though the Solicitor General attempted to ratify the petition after-the-fact by filing a brief as amicus curiae in support of the special prosecutor. *Id.* at 698, n.5; *See also Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (judicial appointment of a prosecutor with a conflict of interest deemed a form of structural error that was per se reversible since it "diminishes faith and fairness of the criminal system in general").

The fact that an improper government representative who was in violation of the law, selected to participate in the most important part of the prosecution, the Grand Jury, the same structural error as addressed in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), has occurred. *See also Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1981); *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Similarly, other courts have consistently held that the conducting of a Grand Jury proceeding by a prosecutor whose appointment is defective is a **"jurisdictional-problem"**. *See United States v. Durham*, 841 F.2d 886, 892 (9th Cir. 1991). The case at hand involves a far more severe impropriety than a defective appointment. Ms. Ward was a law breaker during her appearance before the Grand Jury.

Ironically, the first case holding that an improper prosecutor involved in the returning of an indictment against a citizen, results in the reversal of a defendant's conviction, originated in the same district in which Mr. Ida was prosecuted. *United States v. Rosenthal*, 121 F. Supp. 862 (S.D.N.Y. 1903). That court used the rule of common law in establishing that cases built upon an indictment returned by a Grand Jury invaded by an improper representative could not stand if the integrity of the legal system was to endure.

III. IT HAS BEEN ESTABLISHED IN THE STATE COURTS AS WELL AS THE FEDERAL COURTS THAT ALL ATTORNEYS INCLUDING GOVERNMENT ATTORNEYS ARE REQUIRED TO PASS THE BAR IN WHICH THEY PRACTICE

Although the states have constitutionally permissible and substantial interest in regulating bar admission, *In Re Griffiths*, 413 U.S. 717, 723, 93 S. Ct. 2851, 2855, 37 L. Ed. 2d 910 (1973), the standards of qualification promulgated "must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957); accord *Martin-Trigona v. Underwood*, 529 F.2d 33, 35 (7th Cir. 1975).

This Court has noted that under the conceivable rational basis test, that it may sustain any legislative classification based upon "a[ny] state of facts that reasonably can be conceived to constitute a distinction or difference in state policy. . . ." *Allied Stores v. Bowers*, 385 U.S. 522, 530, 79 S. Ct. 437, 443, 3 L. Ed. 2d 480 (1959).

The concern for bar applicants' character and fitness meets the minimum standards of conceivable rational basis test. *See generally Schware*, 353 U.S. at 239, 77 S. Ct. at 756; *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-90, 75 S. Ct. 461, 464-66, 99 L. Ed. 563 (1955). Under the mere rationality level of review, it is of no concern that the rule is not the least restrictive means to a permissible end, and the fact that Ms. Ward had various state credentials may not be the best way to ensure her character and fitness to practice law in the State of New York when in fact she

was in violation of the Rules of Ethical Conduct and the law during her control of the Grand Jury investigating Ida. *See Williamson*, 348 U.S. at 487, 75 S. Ct. at 464.

New York County Laws § 702 and 930, as well as New York Judiciary Law § 478, 484, 485 are not violative of the Equal Protection Clause simply because it enforces a higher standard of professionalism. It is a more direct way of ensuring both the character and fitness of all attorneys who select to appear in the courts in that state, whether it be local, state, or federal. Nor does the standard cause for an unfair hardship upon Ms. Ward. *Martin v. Walton*, 368 U.S. 25, 26, 82 S. Ct. 1, 2, 7 L. Ed. 2d 5 (1961); *Colgate v. Harvey*, 296 U.S. 404, 436, 56 S. Ct. 252, 261, 80 L. Ed. 299 (1935); cited in *Lowrie v. Goldenhersh*, 716 F.2d 401 (7th Cir. 1983); *Accord Shapiro v. Cooke*, 552 F. Supp 581 at 586-587 (S.D.N.Y. 1982).

Ms. Ward had a legal obligation to adhere to the Rules of Ethical Conduct for the State of New York if she was to function as a proper government representative in the prosecution of Ida. It would be difficult to believe that she was unaware of the bar admission requirements such as those embodied in New York laws. *See Lowrie v. Goldenhersh*, 716 F.2d 401 at 413 (7th Cir. 1983). The law requires that Ms. Ward perform the same tasks expected of every attorney who practices law which would have included permission from the court to appear pro hac vice due to the fact she was without proper licensing. *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948); *Shapiro v. Cooke*, 552 F. Supp. 581 at 588 (S.D.N.Y. 1982). The practice of law is not a fundamental right or activity under Art. IV, § 2, *Leis v. Flynt*, 439 U.S. L. Ed. 2d 717 (1979).

This Court has also recognized that the Supremacy Clause does not allow legal practitioners from ignoring their duty to adhere to mandatory bar memberships and local bar dues which are in no way unconstitutional. *See Keller v. State Bar of California*, 499 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990).

A most recent case involving the issue of proper licensing of attorneys has been addressed in *The People of the State of Illinois v. Elvis E. Dunson*, No. 97-CM-4500 (S.C. Ill. 2000) ("a judgment procured by an unlicensed person on behalf of another party is void"); *quoting People v. Munson*, 319 Ill. 596 (1925) (**"an indictment procured through the participation of an unlicensed person acting as a State's Attorney must be quashed"**); *People v. Jackson*, 163 A.D.2d 489, 558 N.Y.S.2d 590 (1990); *In re Curry*, 86 N.Y.2d 470, 657 N.E.2d 1311, 634 N.Y.S.2d 28 (1995).

It becomes apparent from the cases cited above, law mandated Ms. Ward was obligated to secure proper New York licensure before she conducted the Grand Jury proceedings that resulted in the indictment against Ida. Anything less, would deem her as an improper government representative, causing for the district court to lack jurisdiction to hear the criminal prosecution.

CONCLUSION

For the foregoing reasons, the request for writ of certiorari should be granted. The question raised is one that effects every citizen who becomes subject to a Grand Jury investigation, and mandates that a properly licensed attorney appears before those hearings.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED SEPTEMBER 14, 2000

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of September, two thousand.

PRESENT:

HON. THOMAS J. MESKILL,
HON. GUIDO CALABRESI,
HON. SONIA SOTOMAYOR,
Circuit Judges.

00-1092

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES IDA, aka Jimmy, aka Little Jimmy, aka The Little Guy,

Defendant-Appellant,

Appendix A

LIBORIO BELLOMO, also known as Barney, MICHAEL GENEROSO, also known as Mickey Dimino, NICHOLAS FRUSTACI, also known as Nicky the Blond, THOMAS CESTARO, also known as Gigali, also known as Gigalese, THOMAS BARRETT, JOHN SCHENONE, also known as Big John, ANTHONY PISAPIA, also known as Tony Waterguns, also known as Fat Tony, ANTHONY COIRO, MICHAEL AUTUORI, LEONARD CERAMI, LOUIS RUGGIERO, SR., COLOMBO SAGGESE, also known as Edwards, JOSEPH PISACANO, ALBERT SETFORD, also known as Spike, VINCENT BATISTA, also known as Skippy, VINCENT ROMANO, LOUIS ZACCHIA, also known as Louis Zack,

Defendants.

SUMMARY ORDER

* * *

Appeal from the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Defendant-appellant James Ida appeals from the decision of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) denying his motions for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and for related relief. Appellant argues

that the district court abused its discretion in rejecting his argument that "newly discovered evidence" of prosecutorial misconduct merited a new trial. The crux of appellant's contentions is that (1) Barbara A. Ward, an Assistant United States Attorney allegedly involved in the grand jury proceedings that led to Ida's indictment, was not licensed to practice law in the State of New York during her participation in these proceedings, (2) federal law requires Assistant United States Attorneys to be licensed in the state containing the District to which they are assigned, and (3) accordingly, Ward's presence before the grand jury violated Federal Rule of Criminal Procedure 6(d)(1) because she was not properly an "[a]ttorney[ ] for the government."

Appellant's arguments lack merit because the facts concerning Ward's admission to the New York bar were a matter of public record at the time of his trial. Therefore, he cannot show that the evidence on which he rests his Rule 33 motion "could not have been discovered, exercising due diligence, before or during trial." *United States v. Siddiqi,* 959 F.2d 1167, 1173 (2d Cir. 1992). We need not address whether this shortcoming could be excused by any inability, on the part of Ida or his trial counsel, to appreciate, prior to entry of judgment, the legal significance of such easily discoverable facts; this is so because appellant relies, in relevant part, upon a provision in place since 1979. *See* Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 3(a), 93 Stat. 1040, 1044 (1979). It is of no aid to appellant that another law on which he relies, the McDade Amendment, which was part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Title VIII,

§ 801(a), 112 Stat. 2681-118 (1998), and is codified at 28 U.S.C. § 530B, was not passed until after he was convicted and sentenced. The McDade Amendment did not take effect until after the proceedings at issue had concluded, 112 Stat. 2681-119, and so it has no bearing here.

We have considered appellant's further arguments, and we find them to be without merit. The decision of the district court is AFFIRMED.

For the Court:

ROSEANN B. MACKECHNIE,
Clerk

by s/ Lucille Carr

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 14, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S1 96 Crim. 430 (LAK)

UNITED STATES OF AMERICA,

– against –

JAMES IDA,

Defendant.

ORDER

LEWIS A. KAPLAN, *District Judge.*

Defendant moved on October 15, 1999 for a new trial based on newly discovered evidence and then filed an additional motion, dated October 25, 1999, to supplement the first. The basis for the application is the defendant's allegedly recent discovery that Assistant United States Attorney Barbara A. Ward — who participated in the trial and, according to defendant, the grand jury proceedings in this matter — was not licensed to practice law in the State of New York at the relevant times. This claim is without merit.

New trial motions "are not favored and should be granted only with great caution." *United States v. Costello,* 255 F.2d

876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). Where, as here, such a motion is premised on a claim of newly discovered evidence, the movant must show that the evidence in fact has been newly discovered, that it could not have been discovered earlier with due diligence, that it is material to the issue of guilt, that it is not be cumulative, and that the evidence probably would result in acquittal upon retrial. *See generally United States v. Gallego*, 191 F.3d 156, 161 (2d Cir. 1999); *Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir. 1988).

Defendant's application falls short on virtually each of these criteria. The fact that Ms. Ward was not admitted in New York was readily available at the time of trial. Hence, if it had been a matter of concern to the defendant, there was plenty of opportunity for defendant to have ascertained the facts. But this is by no means a significant factor in the disposition of the motion. The crucial points are that Ms. Ward's admission status was not material to the defendant's guilt and the defendant's knowledge of that fact most assuredly would not result in acquittal upon retrial.

Nor is a new trial warranted on a theory of prosecutorial misconduct based on Ms. Ward's participation. First, even if the government were wrong in arguing that there was no need for Ms. Ward to have been admitted to the New York bar before participating in the trial or, if she did, the grand jury proceedings, an issue the Court need not decide, its position has sufficient merit to avoid any successful charge of misconduct. The government had every reason to believe that her participation was entirely proper, as indeed it

probably was. Second, any error with respect to Ms. Ward's alleged appearance before the grand jury surely was harmless. *See United States v. Mechanik,* 475 U.S. 66 (1986).

The motion to supplement defendant's pending Rule 33 motion is granted. The motion for a new trial, as supplemented, is denied. This disposition also moots defendant's motion for discovery of grand jury transcripts (docket no. 613), which therefore is denied.

SO ORDERED.

Dated: December 14, 1999

s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 17, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S1 96 Crim. 430 (LAK)

UNITED STATES OF AMERICA,

– against –

JAMES IDA,

Defendant.

ORDER

LEWIS A. KAPLAN, *District Judge.*

On December 14, 1999, this Court denied defendant's motion for a new trial, as supplemented. Today it belatedly received reply papers in support of the motion. The Court therefore *sua sponte* treats the reply papers as a motion for reconsideration and grants reconsideration. On reconsideration, however, the Court adheres to its original decision. For the reasons previously expressed, defendant's motion is without merit.

SO ORDERED.

Dated: December 17, 1999

s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 20, 2000

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of Nov. two thousand.

Dkt No: 00-1092

USA

v

IDA

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant James Ida.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Appendix D

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney